APPENDIX

Pertinent portions of Opinion and Recommended Conclusions of Law of the Commissioner on Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment dated August 2, 1965 in *Thompson Ramo Wooldridge Inc.* v. *United States,* Ct. Cl. No. 104-64.

IN THE UNITED STATES COURT OF CLAIMS

No. 104-64

(Filed Aug. 2, 1965)

THOMPSON RAMO WOOLDRIDGE INC., v. THE UNITED STATES

Opinion and Recommended Conclusions of Law of the Commissioner on Plaintiff's Motion and Defendant's Cross-Motion For Summary Judgment.

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The following opinion and recommendation for conclusions of law are submitted pursuant to the court's order under Rule 54(b):

OPINION OF THE COMMISSIONER

By these cross-motions for summary judgment the parties seek to test an ASBCA (Armed Services Board of Contract Appeals) decision interpreting the impact of a disclaimer clause on a standard provision for government-furnished property. The Navy awarded a contract for radio transmitters and furnished microfilms of prior manufacturing drawings under terms exciting the present controversy. A claimed $248,373 is at stake.

The plaintiff [1] was awarded its contract on June 28, 1957. The radio transmitters were to duplicate a government-furnished model derived from a previous procurement. Components of the old and the new procurements were to be interchangeable, unless prevented by obliged adherence to the controlling specification known as SHIPS-T-2697.

[1] The contract was originally awarded to Production Research Corporation, which was with Navy approval succeeded in interest by Radio Condenser Company, which, in turn, was later acquired by the present plaintiff. The term "plaintiff" is used herein to denote any and all of the three successive contractors.

Additional General Provision 30 of the contract, entitled "Government-Furnished Property" (hereafter shortened to AGP clause), called for the Government to furnish the "property described in the Schedule or specifications" with related data "as may reasonably be required for the intended use of such [government-furnished] property." If the property furnished was "in a condition not suitable for the intended use", the contractor could either return it or fix it, and obtain an equitable adjustment in price and delivery terms under the standard Changes clause of the contract.

The contract "Schedule" contained another government-furnished property clause (hereafter termed the Schedule Clause), which in brief required the Government to furnish plaintiff a model radio transmitter, two Technical Manuals, and a set of microfilm of manufacturing drawings from a previous procurement of approximately the same radio transmitter. The following portion of the Schedule clause, referring to the items to be furnished, harbors the root of the present dispute:

> These Government-Furnished items were accepted by the Government pursuant to the contract(s) under which they were procured by and delivered to the Government, but the Specifications and other requirements of said contract(s) are not identical to the requirements of this contract. These Government-furnished items are furnished for such information and assistance as they may provide the Contractor with respect to the general nature of equipments and maintenance parts to be delivered under this contract, and for use of the Contractor in meeting the requirements of this contract with respect to interchangeability as set forth under the heading "Production Equipment" above. In addition the copies of Technical Manual NAVSHIPS 92018 are furnished for use of the Contractor in meeting the requirements of this contract with respect to Technical Manuals, Revisions and Negatives. The Government does not represent that the Government-furnished AN/FRT-18 Radio Transmitter meets the requirements of this contract in

> every respect, *nor does it represent that the microfilm is legible in whole or in any particular part or that the drawings from which the microfilm was made, are complete and accurate in all respects or in any particular respect,* and it does not represent that equipments or maintenance parts made in accordance with the Government-furnished AN/FRT-18 Radio Transmitter and/or Technical Manual NAVSHIPS 92018 and/or Microfilm of Manufacturing Drawings will meet the performance or other requirements of this contract including the specifications referenced directly or indirectly herein. (Emphasis supplied.)

To the extent of any inconsistency between the Schedule and the rest of the contract provisions, contract provision 39 said the Schedule was to control.

Amendment 3 to the contract limited the interchangeability requirements to "those parts and components being supplied as maintenance and spare (repair) parts and those parts of the Government-Furnished [transmitter] which are readily accessible and can be easily removed from the said Government-Furnished [transmitter]."

The technical manual was the only item of government-furnished property originally available for inspection during the bidding period. The plaintiff declined to bid without an opportunity to inspect microfilms of manufacturing drawings from the prior procurement. Thereupon the invitation was amended to permit such inspection by bidders. The plaintiff's representative inspected the film for what the Board later termed "the allotted three hour period" (*Radio Condenser Company,* ASBCA No. 8149, 1963 BCA § 3931), and reported that "the index appeared to be complete, well organized, and that the microfilm, as best he could tell from the use of the viewer appeared to be fair." Thereafter the plaintiff's bid was accepted and the contract awarded.

The contractor sent the microfilms out to obtain manufacturing prints, and found not only that a large number of the prints were of poor quality and unusable, but also that the films for a particular component were missing entirely.

The Government replaced a small portion of the defective film. The defects caused the contractor heavy expenses and loss of time by engineers and draftsmen in retracing drawings, obtaining missing information by checking the film through a viewer and recording the information on the drawings, and disassembling the model to obtain missing measurements.

* * *

As eventually refined in the plaintiff's brief opposing the Government's cross-motion for summary judgment, the plaintiff's defense to the disclaimer aspect of the Schedule clause is threefold,—a primary position and two alternative positions. In its primary position the plaintiff argues that the Schedule clause is not only consistent with the AGP clause, but is also itself *internally* consistent. The internal consistency of the Schedule clause is said to be shown by (1) its statement that the microfilms were accepted by the Government under a prior contract and, *ergo,* should have been of standard, commercial quality because the Government will accept nothing less; and (2) its statement that the Government does not represent the microfilms to be legible in whole or in any particular part, which means merely that they lacked 100 percent perfection, and does not mean that the Government is protected if in fact the films are 100 percent useless. This is ingenious but not tenable for several reasons. When the plaintiff first received the invitation containing the disputed Schedule clause it obviously interpreted it to mean that it canceled out the suitability warranty in the AGP clause, for it declined to bid unless given an opportunity to first inspect the microfilms. The invitation was altered to provide the opportunity; the plaintiff performed its inspection of the microfilms, and thereupon submitted its successful bid, clearly accepting in so doing the risk that the microfilms might not be usably legible or intact. Again: were the plaintiff's contention correct that the warning in the Schedule clause extended only to a level of substantial usability of the microfilms, then the disclaimer would be without visible purpose, for it would offer no more protection for

the parties than the standard wording of the AGP clause which promised either microfilms in a condition "suitable for the intended use" or a compensating equitable adjustment if they were not.

It is more plausible to interpret the AGP clause as a requirement that the Government furnish the "property described in the Schedule" which must be "suitable for the intended use" unless the Schedule clause provides a lesser standard of perfection, or perhaps (as here) a complete disclaimer of responsibility for condition. Government-owned property whose use is made available to a contractor may be in varying degrees of condition, and the important object is that the Government not represent such property to be better than it turns out to be, on pain of damages. The Government is not bound by the terms of the AGP clause to limit its supply of property to that which is suitable for the intended use if the minds of the parties meet on some lesser standard incorporated elsewhere in the contract. Otherwise the Government would conceivably refrain from extending to contractors the use of certain property whose condition is not fully apparent or known, but without which the contractor could not perform. This is exemplified in the present case. The microfilms furnished the plaintiff were apparently the product of photographing the prior contractor's manufacturing drawings which themselves had been badly used and marked up in the manufacturing process, and thus their imperfections were faithfully reflected in the microfilms, if not worsened. How the Government obtained the microfilms and why it was not in possession of a fresh, unmarked set of manufacturing drawings is not explicit in the record, nor need it be since the plaintiff's bid submission following its inspection of the microfilms should thereafter silence complaints as to their condition.

The alleged consistency between the disclaimer language in the Schedule clause and the warranty language in the AGP clause rests on the plaintiff's interpretation of the former to provide a corresponding degree of perfection in

the microfilms. The preceding paragraphs expose the illogic.

* * *

The plaintiff's second (and final) alternative position is to advance three reasons why the warranty in the AGP clause cannot be negated or removed by anything in the Schedule clause. These reasons are (1) the rule in *G. L. Christian and Associates,* 160 Ct. Cl. 1 (1963), 312 F.2d 148, *rehearing denied,* 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963), *rehearing denied after final judgment,* Ct. Cl., May 3, 1965; (2) public policy; and (3) the Board's unreasonable misconstruction of the contract. These will be addressed in that order.

The *Christian* case, *supra,* holds that provisions made mandatory by the Armed Services Procurement Regulations are incorporated by law in a Government contract even though not physically contained therein. The analogue of this should be that a mandatory provision cannot be removed or diminished. The AGP clause relating to government-furnished property is mandatory under ASPR §13-502 (Revised April 27, 1955). Plaintiff contends that, to the extent the disclaimer provision of the Schedule clause vitiates the warranty of fitness in the AGP clause, the former is a nullity. This is the first attempt to the writer's knowledge to employ the *Christian* doctrine against the Government, and the defendant says it cannot lie because it is settled law that the procurement statutes and regulations are for the benefit of the Government, and a third party cannot complain of any deviation therefrom, citing *Hartford Accident and Indemnity Co.* v. *United States,* 130 Ct. Cl. 490, 493 (1955), and others.

In *Hartford* the use of a nonstandard delay clause resulted in assessment of liquidated damages to the contractor, whereas the standard delay clause which was not used did not provide for liquidated damages. Answering *Hartford's* contention that the Government could not deviate from a mandatory clause, the court there ruled that since the regulations were promulgated for the benefit of the

Government, and not for the benefit of anyone else, the other party to the contract cannot complain that the regulations were not complied with. There is reason to believe that the ruling in the *Hartford* case on this point was *dicta,* in that it was not necessary to a disposition, for that contract was let pursuant to an Executive Order under the First War Powers Act of 1941, which specifically authorized the contracting agencies to enter into contracts "without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts." The other three cases cited by defendant in support of its theory actually involve the Government's failure to follow forms required by statute or the omission of mandatory provisions designed for the Government's benefit and not the contractor's. *Perkins* v. *Lukens Steel Company,* 310 U.S. 113, 127 (1940); *United States* v. *New York & Porto Rico S.S. Co.,* 239 U.S. 88, 92 (1915); *National Electronics Laboratories, Inc.* v. *United States,* 148 Ct. Cl. 308, 314 (1960). Logically there should be no difference in the result whether the omitted provision is for the benefit of the Government or the contractor, even though the Government can enforce the absent provision against the contractor, as was done in the *Christian* case, *supra,* while the contractor cannot enforce it against the Government. The latter is lawful because the contractor's recourse in such case is to refuse to enter into a deficient contract, and by entering into it knowingly he acquiesces in its consequences. The act of the Government in violating procurement regulations by failing to reduce the contract to writing has been held to make the contract voidable at the Government's election, not void, for the Government may waive forms designed for its protection, but the contractor cannot profit from the delinquency. *United States* v. *New York & Porto Rico S.S. Co., supra,* at page 89. Thus, even if the Schedule clause in the present case canceled out the warranty in the AGP clause, the plaintiff cannot insist on the warranty. It will be noted that in its primary and first alternative posi-

tions the plaintiff urges with pardonable ambivalence that the two clauses are mutually consistent.

As the second reason supporting its second alternative position the plaintiff claims that public policy forbids modification of the warranty in the AGP clause by the Schedule clause to permit the Government to supply worthless microfilms.

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RECOMMENDATION FOR CONCLUSION OF LAW

On the basis of the plaintiff's motion for partial summary judgment, the defendant's motion for summary judgment, and mutual responses and briefs filed by the parties, it is recommended that an order be entered as follows:

> On the basis of plaintiff's motion for partial summary judgment, the defendant's motion for summary judgment, and the mutual responses and briefs supplied by the parties, it is ordered this ..... day of ....., 1965:
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> That plaintiff's motion for partial summary judgment be and the same hereby is denied, and that the defendant's motion for summary judgment is allowed and the petition is dismissed.

Respectfully submitted,

C. Murray Bernhardt, Commissioner.